Supreme Court, U.S.
FILED
MAR 14 2001
CLERK

No. 00-969

In the Supreme Court of the United States

THERESA MARIE SQUILLACOTE AND KURT ALAN STAND, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

BARBARA D. UNDERWOOD
Acting Solicitor General
Counsel of Record

JOHN C. KEENEY
Acting Assistant Attorney General

SANGITA K. RAO
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

35 pp.

QUESTIONS PRESENTED

1. Whether the government is barred from making derivative use of conversations allegedly protected by the evidentiary privilege for psychotherapist-patient communications.

2. Whether the district court improperly defined the terms "connected with the national defense" and "relating to the national defense" for purposes of 18 U.S.C. 793 and 794 (1994 & Supp. IV 1998).

3. Whether the court of appeals erred in upholding the validity of the government's applications for authorization to conduct electronic surveillance and physical searches under the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. 1801 *et seq.*, without disclosing the applications and the related materials to the defense.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-66a) is reported at 221 F.3d 542.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 2000. A petition for rehearing was denied on September 8, 2000 (Pet. App. 67a-68a). The petition for a writ of certiorari was filed on December 7, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioners Theresa Marie Squillacote and Kurt Alan Stand were convicted on one count of conspiring to transmit documents and infor-

mation relating to the national defense, in violation of 18 U.S.C. 794(a) and (c) (Count 1); one count of attempting to transmit documents and information relating to the national defense, in violation of 18 U.S.C. 794(a) and 2 (Count 3); and one count of obtaining documents connected with the national defense, in violation of 18 U.S.C. 793(b) and 2 (Count 4). Squillacote was also convicted on one count of making false statements, in violation of 18 U.S.C. 1001 (1994 & Supp. IV 1998) (Count 5). Squillacote was sentenced to 262 months' imprisonment to be followed by five years' supervised release. Stand was sentenced to 210 months' imprisonment to be followed by five years' supervised release. The court of appeals affirmed. Pet. App. 1a-66a; Gov't C.A. Br. 2-4.

1. Squillacote and her husband, Stand, along with their friend, co-conspirator James Clark, are citizens of the United States who, over the course of decades, conspired to commit espionage against the United States on the behalf of various foreign powers. They began as agents of the German Democratic Republic (East Germany). Their handler was Lothar Ziemer, an officer with East Germany's foreign intelligence agency, commonly known as the HVA. By the early 1970s, Stand was working as an HVA agent for Ziemer. Stand recruited Clark to be an HVA agent in 1976, and Squillacote to be an HVA agent between 1979 and 1981. Pet. App. 3a.

The HVA provided the three conspirators with extensive training on such matters as detecting and avoiding surveillance, receiving and decoding messages sent by shortwave radio from Cuba, mailing and receiving packages through the use of "accommodation" addresses, using code words and phrases, using a miniature camera to photograph documents, and removing classified markings from documents. The conspirators received a substantial amount of money from

the HVA to fund their trips to other countries to meet with their handlers. Pet. App. 3a-4a.

On instructions from the HVA, the conspirators moved to Washington, D.C. Squillacote enrolled in, and graduated from, law school. She chose to specialize in government procurement law in order to gain "a certain level of access." She sought jobs that would place her in proximity to sensitive classified information. She used family connections to obtain a temporary position with the House Armed Services Committee. She also applied for various jobs involving access to classified national defense information with governmental agencies such as the Central Intelligence Agency and the National Security Agency. In 1991, she obtained a job as an attorney with the Department of Defense. She eventually became the Director of Legislative Affairs in the Office of the Undersecretary of Defense (Acquisition Reform), a position that required a security clearance and provided access to valuable information. Pet. App. 4a-5a; J.A. 2190.[1]

By the time Squillacote secured that position, however, East Germany had collapsed. The conspiracy nonetheless endured. Ziemer had begun to work for the KGB, the Soviet Union's intelligence agency. Ziemer maintained his relationships with Stand, Squillacote, and Clark, and they, too, became involved with the KGB. Pet. App. 5a.

In April 1992, Ziemer was arrested and subsequently convicted in Germany on charges relating to his intelligence activities with the KGB. After Ziemer's arrest, the three conspirators discussed the possibility of future intelligence

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[1] Clark, after obtaining a master's degree in Russian, also sought jobs that would give him access to classified information. He worked for a private company and later for the United States Army in positions that required him to obtain a security clearance. He succeeded in obtaining, through friends at the State Department, and delivering to the HVA many classified documents relating to the national defense. Pet. App. 4a; Gov't C.A. Br. 16.

work, perhaps for Vietnam or Cuba, and Squillacote expressed her interest in South Africa's Communist Party. In September 1992, after Ziemer was released from prison, the conspirators reestablished contact with him, discussing threats to their safety as well as potential espionage activities. In 1994, Squillacote approached David Truong, who had been convicted some years earlier of espionage on behalf of North Vietnam, as part of her search for "another connection," but the overture went nowhere. Pet. App. 5a-6a; Gov't C.A. Br. 23-26; J.A. 2290.[2]

In 1995, Squillacote procured a post office box in Baltimore, Maryland, under the alias "Lisa Martin." Using that alias, she wrote to Ronnie Kasrils, the Deputy Defense Minister of South Africa and a senior Communist Party official. She spent months composing the letter, which detailed her views on the collapse of socialism and the future of communism. She hoped that Kasrils would "read between the lines." Both Stand and Clark were aware of the letter. Pet. App. 6a; J.A. 1912.

In February 1996, Squillacote received a Christmas card from Kasrils, thanking her for "the best letter" that he had received in 1995. Squillacote and Stand were delighted to receive the note, and they began to think that a connection might be made. Squillacote began a second letter to Kasrils. Pet. App. 6a; J.A. 1675.

In September 1996, Squillacote found a letter from Kasrils in her Baltimore post office box. The letter invited her to a meeting in New York City with a representative of "our special components." Pet. App. 6a-7a; J.A. 1681.

Unbeknownst to the conspirators, however, the FBI had been investigating them for many years. Starting in January 1996, the FBI obtained authorization under the Foreign

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[2] "Connection" was a term used by the conspirators to refer to potential espionage partners. J.A. 1859.

Intelligence Surveillance Act of 1978 (FISA), 50 U.S.C. 1801 *et seq.*, to conduct clandestine surveillance on petitioners.[3] The surveillance included the monitoring of all conversations in their house as well as calls made to and from their house and Squillacote's office. From the surveillance data, the FBI's Behavioral Analysis Program Team constructed a report that analyzed Squillacote's emotional makeup and offered suggestions on how to tailor a "false flag" operation to "exploit her narcissistic and histrionic characteristics."[4] The September 1996 letter, although ostensibly from Kasrils, was actually written by the FBI as part of that operation. Pet. App. 7a-8a; J.A. 2064.

In October 1996, Squillacote met with the undercover FBI agent who was posing as a South African intelligence officer. Over the next year, she met with the undercover agent three additional times. Stand attended one of the meetings. Pet. App. 8a-9a.

On January 5, 1997, at their second meeting, Squillacote gave the undercover agent four classified documents that she had taken from the Department of Defense. The documents were: (1) "Defense Planning Guidance for Fiscal Year 1997 through 2001," a numbered document, classified "se-

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[3] FISA establishes a special Foreign Intelligence Surveillance Court, composed of seven federal district judges appointed by the Chief Justice, to review applications for authorization of electronic surveillance and physical searches aimed at obtaining foreign intelligence information. See 50 U.S.C. 1803. Each application to that court must be approved by the Attorney General. 50 U.S.C. 1804(a), 1823(a). The application must contain, among other things, a statement of reasons to believe that the target of the surveillance is a foreign power or an agent of a foreign power and a certification from a high-ranking executive branch official that the information sought is "foreign intelligence information" that cannot be obtained by other means. 50 U.S.C. 1804(a), 1823(a). See Pet. App. 12a.

[4] A "false flag" operation is ordinarily one in which an FBI undercover agent poses as a representative of a foreign intelligence service. See Gov't C.A. Br. 28.

cret," with restricted dissemination; (2) "Defense Planning Guidance Scenario Appendix for 1998 through 2003," a numbered document, classified "secret," which forbade reproduction or further dissemination without authorization; (3) "Defense Planning Guidance, Fiscal Years, 1996 through 2001, Final For Comment Draft," which was classified "secret," with restricted dissemination; and (4) "International Arms Trade Report September-October 1994," a CIA intelligence report on international arms trades, which was classified "secret," with restricted dissemination. Three of the documents were copies; the Scenario Appendix was an original. Although the undercover agent had never requested any documents or classified information, Squillacote stated that one day, when she and her secretary were alone in her office, she decided to "score what [she] could score." Pet. App. 9a; J.A. 509.[5]

Squillacote continued to meet with the undercover agent until she and Stand were arrested in October 1997. In a search of petitioners' home, authorities discovered a quantity of incriminating evidence, including espionage-related equipment and copies of two of the documents given to the undercover agent. Pet. App. 10a.

2. A federal grand jury returned a five-count indictment against the three conspirators. Count 1 charged Squillacote, Stand, and Clark with conspiring to transmit "writing[s and] information relating to the national defense" to East Germany, the Soviet Union, the Russian Federation, and South Africa, in violation of 18 U.S.C. 794(c). Count 2 charged Clark with transmitting documents relating to the national defense, in violation of 18 U.S.C. 794(a). Count 3 charged Squillacote and Stand with attempting to transmit "document[s] * * * relating to the national defense" to South Africa, in violation of 18 U.S.C. 794(a) and 2. Count 4

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[5] The four documents underlie most of the charges against petitioners.

charged Squillacote and Stand with obtaining classified documents and writings "connected with the national defense," in violation of 18 U.S.C. 793(b) and 2. Count 5 charged Squillacote with making false statements, in violation of 18 U.S.C. 1001 (1994 & Supp. IV 1998). Clark, after pleading guilty to Count 1, testified against petitioners at trial. Gov't. C.A. Br. 2; J.A. 88, 157-161.

Before trial, petitioners moved to suppress evidence derived from the FISA-authorized surveillance and searches. They contended that the FISA warrants were not supported by probable cause to believe that they were "agents of a foreign power" within the meaning of FISA. The Attorney General filed an affidavit, pursuant to 50 U.S.C. 1806(f) and 1825(g), stating that the district court should review the FISA materials ex parte and in camera because their disclosure would harm national security. The court found that the FISA applications were supported by probable cause. The court also ruled that petitioners were not entitled to disclosure of the FISA warrant applications or to an adversarial hearing on the matter. Pet. App. 14a-15a.

The district court also denied petitioners' request for a hearing to determine whether the government's evidence was derived from sources independent of two allegedly privileged conversations with psychotherapists that were intercepted during the FISA-authorized surveillance. The court ruled that the psychotherapist-patient privilege was not constitutionally based, and therefore that a taint analysis was inapplicable. Pet. App. 23a.

At the end of trial, the district court instructed the jury on the meaning of the terms "connected with the national defense" and "relating to the national defense," for purposes of 18 U.S.C. 793(b) and 794(a). The court explained that, "[t]o prove that documents, writings, photographs or information relate to the national defense, there are two

things that the Government must prove": first, that "the disclosure of the material would be potentially damaging to the United States or might be useful to an enemy of the United States," and, second, that "the material is closely held by the United States government." J.A. 1435. Petitioners objected on the ground that the jury should have been instructed that material cannot "relate to the national defense" if it is available in the public domain. Pet. App. 57a-58a.

3. The court of appeals affirmed. Pet. App. 1a-66a.

First, the court of appeals upheld the validity of the FISA-authorized surveillance of petitioners. The court rejected petitioners' argument that the FISA warrants were invalid because there was no probable cause to believe that petitioners were agents of a foreign power. The court concluded, based on its de novo review of the relevant materials, that each of the more than 20 FISA applications "established probable cause to believe that [petitioners] were agents of a foreign power at the time the applications were granted, notwithstanding the fact that East Germany was no longer in existence when the applications were granted." Pet. App. 14a.

The court of appeals also ruled that the district court properly denied petitioners' request for disclosure of the FISA application materials. The court relied on 50 U.S.C. 1806(f), which requires an in camera and ex parte review of a FISA application where, as here, the Attorney General files an affidavit attesting that disclosure would harm national security and permits disclosure only when "necessary to make an accurate determination of the legality of the surveillance." The court explained that Section 1806(f) "clearly anticipates that an *ex parte*, *in camera* determination is to be the rule," and that "[d]isclosure and an adversary hearing are the exception, occurring only when necessary." The court concluded that no such necessity existed here because

"the documents submitted by the government were sufficient for the district court and this Court to determine the legality of the surveillance." Pet. App. 15a.

Second, the court of appeals rejected petitioners' argument that, under *Kastigar* v. *United States*, 406 U.S. 441 (1972), the district court was required to conduct a hearing to determine whether the government's evidence was derived from sources independent of conversations between petitioners and psychotherapists that were intercepted during the FISA-authorized surveillance.[6] The court explained that "a *Kastigar* analysis is not triggered by the existence of evidence protected by a privilege, but instead by the government's effort to compel a witness to testify over the witness's claim of privilege." Pet. App. 24a. Because neither Squillacote nor Stand was compelled to give testimony, the court found that *Kastigar* was "not applicable to this case." *Id.* at 23a. The court further noted that the psychotherapist-patient privilege is simply an evidentiary rule, not a constitutional requirement, and that derivative evidence generally need not be suppressed for a non-constitutional violation. *Id.* at 26a-27a & n.8.

Third, the court of appeals upheld the district court's jury instruction on the meaning of materials "connected with the national defense" or "relating to the national defense" for purposes of 18 U.S.C. 793(b) and 794(a). The court explained that, in determining whether documents relate to the national defense, "the central issue is the secrecy of the information, which is determined by the government's actions." The court concluded that the district court's instruction "properly focused the jury's attention on the

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[6] As the court noted, one of the conversations at issue was between Stand and one of Squillacote's therapists. The court assumed that the conversation between Stand and the therapist was privileged, and, for convenience, referred to both conversations as having taken place between Squillacote and her therapists. Pet. App. 22a-23a n.7.

actions of the government when determining whether the documents were related to the national defense." Pet. App. 61a.

The court of appeals rejected petitioners' argument that information in official government documents does not relate to the national defense if it "is available to the general public, regardless of who made the information available." Pet. App. 58a. The court explained that "there is a special significance to our government's own official estimates of its strengths and weaknesses, or those of a potential enemy"; thus, "[w]hen those estimates are included in an official document closely held by the government, those estimates carry with them the government's implicit stamp of correctness and accuracy," and are of a different character than "general, unofficial information about the same issues." *Id.* at 63a. Accordingly, the court concluded that "a document containing official government information relating to the national defense will not be considered available to the public (and therefore no longer national defense information), until the *official* information in that document is lawfully available." *Ibid.*[7]

ARGUMENT

1. Petitioners ask the Court to decide whether the government is barred from making derivative use of allegedly

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[7] The court of appeals also rejected other claims raised by petitioners. Although petitioners do not specifically renew their entrapment defense before this Court, petitioners continue to suggest (Pet. 6) that the government induced them to commit the charged offenses by tailoring a sting operation to "exploit[] [Squillacote's] unique psychiatric infirmities." As the court of appeals explained, that argument is "legally irrelevant," given the "overwhelming" evidence of Squillacote's predisposition to commit the crimes. Pet. App. 46a-48a; see *id.* at 48a (noting that Squillacote obtained one of the four classified documents before her first meeting with the undercover agent and concluding that "[c]learer evidence of predisposition is difficult to imagine").

privileged psychotherapist-patient communications that are intercepted during court-authorized electronic surveillance. Pet. 9-14. Neither this Court nor any other court of appeals has required the suppression of such derivative evidence (or a hearing under *Kastigar* v. *United States*, 406 U.S. 441 (1972)) in the circumstances of this case. There is not even any reason to conclude that any such derivative evidence was actually used in this case; as explained below (at 17-18), the record indicates the contrary. Petitioners' claim warrants no further review.[8]

During the FISA-authorized surveillance of petitioners, an FBI agent listened to and transcribed two short telephone conversations that occurred on May 2, 1996. One conversation was between Squillacote and one of her therapists; the other conversation was between Stand and another of Squillacote's therapists. See Pet. App. 119a-128a (transcripts of conversations).[9] The supervising FBI agent, upon learning of the conversations, ordered that no other conversation between petitioner and mental health providers be listened to, indexed, or transcribed. In accordance with those instructions, although six additional conversations between petitioners and various therapists were automatically intercepted, those conversations were not listened to or catalogued. The government did not introduce testimony about, or transcripts of, any patient-therapist conversations at petitioners' trial. But petitioners speculate that the government may have introduced evidence that was somehow derived from those conversations. See *id.* at 22a-23a; J.A. 354, 357.

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[8] This claim is relevant only to Squillacote. Stand does not have standing to challenge any violation of a privilege between Squillacote and her therapists.

[9] We assume for purposes of this discussion, as did the court of appeals (see Pet. App. 22a-23a n.7), that the conversation between Stand and Squillacote's therapist was privileged.

a. This Court has recognized in other contexts that, where the government has obtained information in violation of a rule that is not itself constitutionally compelled, the government is not precluded from making derivative, as opposed to direct, use of the information in a criminal case. Put differently, the Court has not extended the "fruit of the poisonous tree" doctrine beyond evidence obtained in violation of the Constitution.

In *Wong Sun* v. *United States*, 371 U.S. 471 (1963), the Court held that evidence discovered as an indirect result of a search in violation of the Fourth Amendment had to be suppressed as "fruit of the poisonous tree," unless the government could demonstrate that the evidence was obtained "by means sufficiently distinguishable [from the illegality] to be purged of the primary taint." *Id.* at 488. The Court has applied *Wong Sun*'s "fruit of the poisonous tree" doctrine to other constitutional violations. See, *e.g.*, *United States* v. *Wade*, 388 U.S. 218 (1967); *Harrison* v. *United States*, 392 U.S. 219, 222-223 (1968). The Court has also made clear, however, that the doctrine that evidence must be excluded as "'fruit of the poisonous tree' assumes the existence of a constitutional violation." *Oregon* v. *Elstad*, 470 U.S. 298, 305 (1985). Thus, the Court held that the doctrine does not apply to the "fruits" of statements obtained without administering the warnings required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), because those warnings, while serving to protect Fifth Amendment rights, are not themselves constitutionally compelled. See *Elstad*, 470 U.S. at 308 ("Since there was no actual infringement of [Elstad's] constitutional rights, the case was not controlled by the doctrine expressed in *Wong Sun* that fruits of a constitutional violation must be suppressed."); accord *Michigan* v. *Tucker*, 417 U.S. 433, 445 n.19 (1974); cf. *Dickerson* v. *United States*, 120 S. Ct. 2326, 2335 (2000) (discussing *Elstad*).

The psychotherapist-patient privilege is not constitutionally required. It is an evidentiary rule that protects communications between a patient and a psychotherapist from being introduced in a judicial proceeding. See *Jaffee* v. *Redmond*, 518 U.S. 1, 15 (1996); Fed. R. Evid. 501. Such "[t]estimonial exclusionary rules and privileges contravene the fundamental principle that the public . . . has a right to every man's evidence," and therefore "must be strictly construed." *Trammel* v. *United States*, 445 U.S. 40, 50 (1980) (internal quotation marks and citations omitted). The psychotherapist-patient privilege does not extend beyond the protected communication to include other evidence that is not, in itself, protected from disclosure. Thus, the court of appeals correctly held that "the suppression of any evidence derived from the privileged conversations would [not] be proper in this case, given that the privilege is a testimonial or evidentiary one, and not constitutionally based." Pet. App. 26a.[10]

b. Petitioners contend (Pet. 10-11) that decisions of the Second, Third, and Seventh Circuits conflict with the Fourth

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[10] Other courts of appeals have suggested, consistent with the Fourth Circuit here, that a breach of a non-constitutional evidentiary privilege is not subject to the "fruit of the poisonous tree" doctrine. See, *e.g.*, *Nickel* v. *Hannigan*, 97 F.3d 403, 409 (10th Cir. 1996) ("declin[ing] to apply the 'fruit of the poisonous tree' doctrine to the possible breach of attorney-client privilege" in a state habeas case where state law did not require exclusion of all evidence derived from a breach of that privilege), cert. denied, 520 U.S. 1106 (1997); *United States* v. *Marashi*, 913 F.2d 724, 731 n.11 (9th Cir. 1990) (observing in dictum that "no court has ever applied [the 'fruit of the poisonous tree'] theory to *any* evidentiary privilege," such as the marital communications privilege at issue there, and "we have indicated we would not be the first to do so"); *United States* v. *Lefkowitz*, 618 F.2d 1313, 1318 n.8 (9th Cir.) (rejecting contention that marital communications privilege was "constitutionally grounded" and consequently expressing "doubt" that information derived from a violation of that privilege "would in any way be 'tainted'"), cert. denied, 449 U.S. 824 (1980).

Circuit's decision in this case on the question "whether the government may make derivative use of information it obtains in violation of a non-constitutional, common-law testimonial privilege." No square conflict exists. None of the five assertedly conflicting cases cited by petitioners involves the psychotherapist-patient privilege. Two of the cases concern the attorney-client privilege, which the court of appeals distinguished, and neither of those cases actually suppressed evidence derived from a violation of that privilege. The remaining cases do not involve any "violation of a * * * privilege" at all; they instead concern the scope of the immunity that must be provided when witnesses invoke a privilege in judicial proceedings, a circumstance that the court of appeals here viewed as distinguishable.

Petitioners rely on two cases involving claims that the government prosecuted a defendant based on information derived from a violation of the attorney-client privilege. See *United States* v. *White*, 970 F.2d 328 (7th Cir. 1992); *United States* v. *Schwimmer*, 892 F.2d 237, 245 (2d Cir. 1989), cert. denied, 502 U.S. 810 (1991). Neither case squarely held that all evidence derived from a violation of the attorney-client privilege must be suppressed. In *White*, the court of appeals determined that the government had *not* introduced evidence at trial that "stem[med] directly or indirectly" from evidence obtained in violation of the attorney-client privilege; accordingly, the court concluded that it "need not determine whether due process is implicated" by the government's use of such information. 970 F.2d at 336. In *Schwimmer*, the court of appeals remanded the case to the district court to determine whether the government had introduced evidence derived from a violation of the attorney-client privilege and, if so, "whether a substantial right of the [defendant] was affected," thereby leaving open the possibility that the use of such evidence would not invalidate the prosecution. 892 F.2d at 245.

Moreover, the court in *Schwimmer* characterized the attorney-client privilege as serving constitutional values, which distinguishes it from other types of evidentiary privileges, including the psychotherapist-patient privilege involved in this case. See 892 F.2d at 243 (noting that the attorney-client privilege "provides essential support for the constitutional right to the assistance of counsel"). And the court of appeals here distinguished its decision in this case from the scenario in *White* on the basis that *White* involved the attorney-client privilege. Pet. App. 27a n.8. The court explained that, "[e]ven assuming that suppression of derivative evidence may, under extraordinary circumstances, be required in cases involving the attorney-client privilege, such an extreme remedy is not required in this case." *Ibid.*

Petitioners also rely on cases that hold that a witness's assertion of the privilege against adverse spousal testimony may be overcome if the government promises the spouse immunity from direct and derivative use of the testimony. See *In re Grand Jury*, 111 F.3d 1083, 1088 (3d Cir. 1997); *In re Grand Jury Subpoena of Ford*, 756 F.2d 249, 252 (2d Cir. 1985); see also *In re Grand Jury Matter*, 673 F.2d 688 (3d Cir.) (a witness could not be compelled to give testimony over a claim of that privilege where the government declined to provide derivative use immunity to the spouse), cert. denied, 459 U.S. 1015 (1982). Those cases are unlike this one because neither petitioners nor the therapists were compelled to testify about privileged conversations. No issue arose in this case as to the scope of any immunity that would have to be granted in such circumstances. Indeed, the court of appeals cited such cases approvingly in "agree[ing]" with petitioners that "*Kastigar*-like protections may be required in cases involving testimony compelled over the assertion of a non-constitutional privilege." Pet. App. 25a.[11]

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[11] In *Kastigar*, the Court upheld the constitutionality of the use immunity statute, 18 U.S.C. 6001 *et seq.*, which permits the government to

Petitioners suggest (Pet. 12 n.2) that the court of appeals drew "a distinction without a difference" between this case and cases involving grants of immunity. But the fact remains that petitioners cite no decision that squarely places a bar on derivative use of the contents of a communication covered by a non-constitutional privilege absent an order compelling testimony. And there is no reason to conclude that, in a case in which the government seeks to compel testimony from a witness invoking such a privilege, the Fourth Circuit would reach a result contrary to the Second and Third Circuits.[12]

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obtain a court order compelling testimony from a witness who invokes the Fifth Amendment privilege against self-incrimination, provided that "no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case." 406 U.S. at 448-449 (quoting 18 U.S.C. 6002). The Court reasoned that, because the statute provides a witness with "immunity * * * coextensive with the privilege" against self-incrimination, the statute "suffices to supplant" the privilege. *Id.* at 462. The Court observed that the government would bear the burden of proving that all evidence proposed for use in any subsequent criminal prosecution of the witness was derived from sources independent of his compelled testimony. *Id.* at 461-462. *Kastigar*, in contrast to this case, involved a constitutional privilege; *Kastigar* is also distinguishable in that it arose in the context of whether, or in what circumstances, a witness's testimony could be compelled.

[12] There are significant differences between this case and the compelled testimony cases. Where a witness invokes a privilege against testifying in a judicial proceeding, the grant of immunity serves to extinguish the witness's right to refuse to testify. See *Grand Jury*, 111 F.3d at 1087 (noting that such a grant of immunity "nullifies any claim of privilege"). But Squillacote's right to assert a privilege has not been extinguished. Moreover, in circumstances where the government must choose whether to provide direct and derivative use immunity in order to obtain a witness's testimony, the government's attorneys are able to assess, at a time when the applicability of the privilege has been recognized, whether the benefits of obtaining the testimony in the present proceeding outweigh the costs (*e.g.*, the inability to use the testimony against the witness or the

c. The question that petitioners present for the Court's review has a somewhat hypothetical quality. There is no reason to conclude that the government has, as petitioners assert (Pet. 13), "use[d] the information contained in [privileged communications] to build a criminal prosecution."

Petitioners speculate that the FBI's Behavioral Analysis Program Team relied on information gleaned from the two conversations to prepare its report analyzing Squillacote's emotional vulnerabilities. But the record undercuts such speculation. Both conversations were relatively brief and undetailed. See Pet. App. 119a-128a. The government acquired essentially identical information from FISA-authorized interceptions of unquestionably non-privileged conversations between Squillacote and her friends or family members.[13] The two government agents who contemporaneously learned the contents of the conversations—the analyst who transcribed the conversations and a supervisor—both declared in sworn affidavits that the conversations were not used in preparing the Behavioral Analysis Program report.[14]

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spouse in another proceeding). The government is not in a similar position where, as here, its investigators come upon possibly privileged material during an investigation.

[13] In the first conversation, Squillacote informed the therapist of a family history of depression, inquired about medications for depression, and was referred to a psychopharmacologist. Pet. App. 125a-128a. In the second conversation, the therapist told Stand that Squillacote was depressed and did not feel safe with herself, that she had been started on an antidepressant medication, and that Stand should watch over her until the medication became effective. *Id.* at 119a-124a. Squillacote discussed the same subjects in many recorded telephone calls with friends and relatives that were unquestionably non-privileged. See Gov't C.A. Br. 93 & n.41 (citing examples from the record of conversations in which Squillacote discussed, among other things, her depression, psychiatric vulnerability, therapy, and treatment with antidepressants).

[14] Specifically, the FBI agent who supervised the surveillance attested that "[n]o information from the two telephone calls" with the therapists "was provided to the individuals who worked on and wrote the [BAP

Thus, even if the question presented by petitioners —whether the government "is entitled to make derivative use of [privileged] communications" (Pet. (I))—otherwise warranted review, such consideration should await a case in which there is reason to believe that the government actually did so. Here, even if the Court were to hold that the government could not make derivative use of privileged psychotherapist-patient communications and remand the case for the *Kastigar*-type hearing that petitioners have sought, there is little, if any, prospect that petitioners would ultimately be entitled to any relief.

2. Petitioners next contend (Pet. 14-21) that the court of appeals erred in sustaining the jury instruction on the term "relating to the national defense." The court of appeals' decision is consistent with this Court's decision in *Gorin* v. *United States*, 312 U.S. 19 (1941), and does not conflict with any decision of any other court of appeals. Petitioners' challenge merits no further review.

The espionage statutes under which petitioners were convicted prohibit an individual from obtaining, taking, or copying documents "connected with the national defense," 18 U.S.C. 793(b), or from transmitting, conspiring to transmit, or attempting to transmit documents or information "relating to the national defense," 18 U.S.C. 794(a) and (c), where such activity is engaged in "with intent or reason to believe that [the information] is to be used to the injury of the United States or to the advantage of a foreign nation."

At trial, petitioners presented evidence that some, but far from all, of the information in the documents that Squillacote took from the Department of Defense, and subsequently

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report]." J.A. 354. The FBI agent who listened to and transcribed the conversations attested that his only role with respect to that report was filling out a personality assessment test on Squillacote and that "[n]othing that [he] learned in either telephone conversation * * * affected [his] answers." J.A. 357.

turned over to the undercover agent, was similar to information available to the public in, for example, newspapers or trade publications.[15] Petitioners argued that, if the information in the documents was in the public domain, the documents were not "relat[ed] to the national defense" or "connected with the national defense." Pet. App. 58a. To that end, petitioners' proffered a jury instruction that stated, in pertinent part, that those terms apply only to "information relating to our national defense which is not available to the public at the time of the claimed violation," and thus not to information that "is lawfully accessible to anyone willing to take pains to find, to sift, and to collate it." J.A. 1645.

The district court refused to give petitioners' proffered instruction. Instead, over petitioners' objection, the court gave the following instruction:

> The term "national defense" is a broad term which refers to the United States military and naval establishments and to all related activities of national preparedness.
>
> To prove that documents, writings, photographs or information relate to the national defense, there are two things that the Government must prove. First, it must prove that the disclosure of the material would be potentially damaging to the United States or might be useful to an enemy of the United States.
>
> And second, it must prove that the material is closely held by the United States government.

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[15] Contrary to petitioners' suggestion (Pet. 19), the record demonstrates only that "snippets" of information contained in the documents were available to the public. Pet. App. 58a; see J.A. 1362 (district court finds that "there is no evidence in this case that all of the information that was put out here was in the public domain"); Gov't C.A. Br. 65 n.26.

> Where the information has been made public by the United States government and is found in sources * * * lawfully available to the general public, it does not relate to the national defense.
>
> Similarly, where sources of information are lawfully available to the public and the United States government has made no effort to guard such information, the information itself does not relate to the national defense.

J.A. 1434-1435. The court of appeals subsequently approved that instruction. Pet. App. 57a-66a.

Petitioners contend (Pet. 15-16) that the jury instruction improperly expanded the definition of "national defense" information to include information that is "freely available to the public." They argue that the district court thereby "stripped petitioners of their ability to present th[e] defense" that the information for which they were prosecuted was available from public sources.

Contrary to petitioners' assertions, the jury instruction is not "inconsistent with this Court's case law." Pet. 14 (capitalization omitted). This Court has never held that information in classified government documents ceases to "relat[e] to the national defense," within the meaning of the espionage statutes, whenever such information may be found somewhere in the public domain. Nor has any court of appeals made such a holding. And, in any event, because the jury was required to find that "disclosure of the material would be potentially damaging to the United States or might be useful to an enemy of the United States," petitioners were not deprived of the opportunity to defend on the ground that the material could not have that effect because it was already publicly available.

a. Petitioners purport to find support for their position in a single sentence in this Court's decision in *Gorin*. See Pet. 16-17. But petitioners read too much into that sentence.

In *Gorin*, the Court considered the construction and constitutionality of Sections 1 and 2 of the Espionage Act of June 15, 1917, ch. 30, 40 Stat. 217-219, which contain nearly identical language to that in Sections 793 and 794. The Court defined the statutory term "national defense" as a "generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness." 312 U.S. at 28 (internal quotation marks omitted). In concluding that such a definition was not unconstitutionally vague, the Court noted the "obvious delimiting words in the statute * * * requiring 'intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation.'" *Id.* at 27-28. The Court explained that such language establishes a scienter element, which "requires those prosecuted to have acted in bad faith." *Id.* at 28. In light of the scienter requirement, the Court concluded that the statutory language was "sufficiently definite to apprise the public of prohibited activities" and "consonant with due process." *Ibid.*[16]

In the course of holding that the scienter requirement defeated a vagueness challenge to the espionage statutes, the *Gorin* Court observed: "Where there is no occasion for secrecy, as with reports relating to national defense, published by authority of Congress or the military departments, there can, of course, in all likelihood be no reasonable intent to give an advantage to a foreign government." 312 U.S. at 28. It is that sentence upon which petitioners seize in claiming that the jury instruction is inconsistent with this Court's case law. They construe that sentence as holding that "'[w]hen there is no occasion for secrecy' * * * the

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[16] Petitioners do not dispute that the district court properly charged the jury on the scienter element of Sections 793 and 794. See J.A. 1430-1433, 1436, 1438-1439, 1442-1443.

'information' at issue cannot give rise to espionage." Pet. 16 (quoting *Gorin*, 312 U.S. at 28).

But that is not what the Court said. Rather, the Court stated that the separate scienter element of the espionage statutes "in all likelihood" would not be satisfied if the information had previously been published by the United States government; in other words, the defendant probably could not be found to have acted with the requisite "intent or reason to believe that the information * * * [was] to be used to the injury of the United States, or to the advantage of any foreign nation" if the United States had already published the information. *Gorin*, 312 U.S. at 27-28. The Court did not even suggest, let alone hold, that the information would automatically cease in those circumstances to satisfy the "relating to the national defense" element of the offense. Much less did the Court address the character of information that had *not* been "published by authority of Congress or the military departments," but that had instead reached the public domain by unofficial (and perhaps unauthorized) channels. *Gorin* is thus of no assistance to petitioners.

b. Petitioners also rely on one court of appeals decision, *United States* v. *Heine*, 151 F.2d 813 (2d Cir. 1945), cert. denied, 328 U.S. 833 (1946), to support their position that the espionage statutes have no application to publicly available information. See Pet. 17. But that case involved material quite different from the material here.

In *Heine*, the defendant, in 1940 and 1941, provided a German company with reports about the aviation industry in the United States. Unlike petitioners, the defendant did not obtain or transmit closely held government documents. Rather, the defendant merely "condensed and arranged" information that "came from sources that were lawfully accessible to anyone who was willing to take the pains to find, sift and collate it," including "ordinary magazines, books

and newspapers," "technical catalogues, handbooks and journals," communications with airplane manufacturers and their employees, and "exhibits, and talks with attendants, at the World's Fair." 151 F.2d at 815. The court noted that "no public authorities, naval, military or other, had ordered, or indeed suggested, that the manufacturers of airplanes—even including those made for the services—should withhold any facts which they were personally willing to give out." *Ibid.*[17]

The Second Circuit reasoned that, just as the espionage statutes are not violated by the dissemination of "information about weapons and munitions of war which the [U.S. armed] services had themselves made public," the espionage statutes are not violated by the dissemination of "information which the services have never thought it necessary to withhold at all." *Heine*, 151 F.2d at 816; see also *ibid.* ("[t]he services must be trusted to determine what information may be broadcast without prejudice to the 'national defense,' and their consent to its dissemination is as much evidenced by what they do not seek to suppress, as by what they utter"). Thus, in stating that the defendant in *Heine* could not be convicted under the espionage statutes for providing the German company with information that had "once been made public, and ha[d] thus become available in one way or another to any foreign government," *id.* at 817, the Second Circuit simply meant that a defendant does not violate those statutes merely by condensing, arranging, and disseminating information that he has lawfully obtained from public sources. The Second Circuit did not hold, as petitioners suggest, that a closely held government document ceases to

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[17] *Heine* thus involved the sort of information that, under the district court's jury instruction in this case, would not "relate to the national defense" under the espionage statutes. It was a case "where sources of information are lawfully available to the public and the United States government has made no effort to guard such information." J.A. 1435.

"relate to the national defense," for purposes of the espionage statutes, whenever the information in the document may be found in the public domain.

As the court of appeals recognized (Pet. App. 63a), a case such as *Heine*, which involved the dissemination of information that is not obtained from, or attributed to, government sources, is quite different from a case such as this one, which involved the dissemination of classified government documents. The court of appeals explained that "there is a special significance to our government's own official estimates of its strengths and weaknesses, or those of a potential enemy," because such estimates "carry with them the government's implicit stamp of correctness," which "in and of itself is a fact that would be highly valuable to other countries." *Ibid.* The Second Circuit itself has recognized the distinction between the dissemination of publicly available information, as in *Heine*, and the dissemination of classified government information. See *United States* v. *Soblen*, 301 F.2d 236, 239 ("[t]he fact that the source of the information was classified as secret distinguishes this case from United States v. Heine"), cert. denied, 370 U.S. 944 (1962).[18]

c. The court of appeals' affirmance of the district court's jury instruction does not, as petitioners suggest (Pet. 18), mean that "the public availability of information [is] irrelevant" in an espionage prosecution involving government documents. As noted above, this Court recognized in *Gorin*

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[18] Petitioners suggest (Pet. 18) that the Fourth Circuit's decision in this case conflicts with its decisions in *United States* v. *Morison*, 844 F.2d 1057, 1071-1072, cert. denied, 488 U.S. 908 (1988), and *United States* v. *Truong*, 629 F.2d 908, 918 n.9 (1980), cert. denied, 454 U.S. 1144 (1982). But the court of appeals reconciled its decision in this case with those prior decisions. See Pet. App. 64a-65a. And, even assuming *arguendo* that any tension exists between this case and either *Morison* or *Truong*, that tension would properly be resolved by the Fourth Circuit, not by this Court. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

that the public availability of information may be relevant to whether the defendant disseminated the information with the intent to damage the United States or to assist a foreign power. See 312 U.S. at 28.

Here, moreover, the district court instructed the jury that, "[t]o prove that documents, writings, photographs or information relate to the national defense," the government must prove, *inter alia*, that "the disclosure of the material would be potentially damaging to the United States or might be useful to an enemy of the United States." J.A. 1435. Such an instruction permits a defendant to argue that, because the material at issue is already in the public domain, its further dissemination could be of no appreciable harm to the United States or benefit to a foreign power.[19]

Finally, if the government had to bear the burden of proving that the information on which an espionage prosecution is based "was not lawfully available in the public domain" at the time of its dissemination, as petitioners urge (Pet. 15 (emphasis omitted)), the government's ability to bring such prosecutions would be severely impaired. The government would effectively be required "to prove, at least as to some piece of information contained in the document, that no person anywhere in the world had ever publicly speculated about that information." Pet. App. 64a. As the court of appeals recognized, "[r]equiring that kind of 'proof of a negative' would unduly hamper the government's ability

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[19] Petitioners also err in suggesting (Pet. 21) that the court of appeals held, "as a matter of law," that the dissemination of government documents falls within the prohibitions of the espionage statutes. Petitioners' argument ignores key portions of the instructions given by the district court and affirmed by the court of appeals, including that the jury must find that the information was "closely held" by the United States, that the information was "potentially damaging" to the United States or "useful to an enemy of the United States," and that the defendants disseminated the information with the intent to harm the United States or to assist a foreign power. See J.A. 1430-1443.

to protect sensitive information and would render successful prosecutions in cases involving closely-held documents nearly impossible." *Ibid.* No court has suggested that the government must bear such a burden.

3. a. Petitioners contend (Pet. 22-25) that the FISA applications and related materials should have been disclosed to them. They are mistaken.

Under FISA, the government may obtain a court order authorizing electronic surveillance or a physical search of an "agent of a foreign power." To obtain such authorization, a federal officer, after receiving the Attorney General's approval, must submit an application to one of seven district judges appointed by the Chief Justice to serve on the Foreign Intelligence Surveillance Court. 50 U.S.C. 1804(a), 1823(a); see also 50 U.S.C. 1803(a). The application must contain, among other things, the identity of the target; a statement of the reasons to believe that the target is an agent of a foreign power; a statement of the procedures to be employed to minimize the acquisition and retention of nonpublic information; and a certification from a high-level Executive Branch official that the official "deems the information sought to be foreign intelligence information" that "cannot reasonably be obtained by normal investigative techniques." 50 U.S.C. 1804(a), 1823(a).

A judge of the Foreign Intelligence Surveillance Court may enter an order authorizing electronic surveillance or a physical search after making specific findings that, *inter alia*, there is probable cause to believe that the target is an agent of a foreign power, the proposed minimization procedures are proper, and the application contains all the required certifications. If the target is a United States person, the judge must also find that the certifications are not "clearly erroneous" on the basis of the information before the judge. 50 U.S.C. 1805(a), 1824(a).

In the event that the government attempts to use evidence derived from a FISA warrant in a criminal proceeding, the "aggrieved person" against whom the evidence is offered may move to suppress the evidence on the ground that the evidence was "unlawfully acquired" or that the surveillance or search "was not made in conformity with an order of authorization or approval." 50 U.S.C. 1806(e), 1825(f). In adjudicating the motion to suppress, the district court must review the FISA application and related materials "in camera and ex parte" if the Attorney General files an affidavit stating that "disclosure or an adversary hearing would harm the national security of the United States." 50 U.S.C. 1806(f), 1825(g). The court may disclose portions of the FISA application materials, under appropriate protective procedures, only if disclosure is "necessary to make an accurate determination of the legality of the surveillance." 50 U.S.C. 1806(f), 1825(g).

Petitioners suggest that the FISA provisions authorizing ex parte and in camera review are improper because, in virtually all other warrant circumstances, the government's application for a warrant must be disclosed to the defendant for purposes of adjudicating the legality of the surveillance. That view disregards the sensitive national security interests involved in foreign intelligence surveillance, which require the adoption of different procedures for the protection of individual privacy. As the District of Columbia Circuit has observed, "[i]n FISA the privacy rights of individuals are ensured not through mandatory disclosure, but through its provisions for in-depth oversight of FISA surveillance by all three branches of government and by a statutory scheme that to a large degree centers on an expanded conception of minimization that differs from that which governs law-enforcement surveillance." *United States* v. *Belfield*, 692 F.2d 141, 148 (1982); see *United States* v. *United States Dist. Court*, 407 U.S. 297, 317 (1972) (com-

menting, in ruling on the authority of the government to conduct electronic surveillance in internal security matters, that constitutional rights are best preserved "through a separation of powers and division of functions among the different branches and levels of Government"). In that way, FISA "reconcile[s] national intelligence and counterintelligence needs with constitutional principles in a way that is consistent with both national security and individual rights." S. Rep. No. 701, 95th Cong., 2d Sess. 16 (1978). Thus, "all courts that have considered the constitutionality of such an *in camera, ex parte* examination have held such examinations proper." *United States* v. *Isa*, 923 F.2d 1300, 1307 n.8 (8th Cir. 1991) (citing cases); *United States* v. *Ott*, 827 F.2d 473, 476-477 (9th Cir. 1987) (no due process violation); *United States* v. *Duggan*, 743 F.2d 59, 74 (2d Cir. 1984) (no Fourth Amendment violation); see *Taglianetti* v. *United States*, 394 U.S. 316, 317 (1969) (per curiam) (adversary proceedings and full disclosure were not necessarily required "for resolution of every issue raised by an electronic surveillance").

Petitioners contend (Pet. 24) that the lower courts had "no legitimate justification" to deny petitioners access to the FISA application materials. They are wrong. The Attorney General filed an affidavit explicitly stating that disclosure of the FISA application materials would harm the national security of the United States. See Pet. App. 14a. The affidavit provided ample justification for the refusal to disclose the materials. See 50 U.S.C. 1806(f).

Petitioners further contend (Pet. 24-25) that the FISA application materials should have been disclosed because petitioners allegedly raised serious questions about the lawfulness of the surveillance and the accuracy of the government's representations. The record does not support petitioners' claim. The district court specifically acknowledged that disclosure would be appropriate if its initial review of the materials revealed "potential irregularities" including

"indications of possible misrepresentation of fact." J.A. 308 (quoting S. Rep. No. 701, *supra*, at 64). The district court found, "after review," that there was "no basis for discovery or an adversary hearing." *Ibid.* The court of appeals came to the same conclusion. It refused to disclose the materials because "the documents submitted by the government were sufficient for the district court and this Court to determine the legality of the surveillance." Pet. App. 15a. In conducting an ex parte and in camera review of the FISA application materials, the courts here acted "in keeping with the procedures contemplated by Congress when it enacted FISA." *Belfield*, 692 F.2d at 147. FISA "clearly anticipates that an *ex parte, in camera* determination is to be the rule," and "[d]isclosure and an adversary hearing are the exception, occurring *only* when necessary." *Ibid.* Accordingly, there is no basis for further review of the lower courts' considered determinations on that sensitive and fact-specific question.

b. Petitioners ask this Court to review whether each of the FISA applications established probable cause to believe that petitioners were agents of a foreign power at the time that the application was made. See Pet. 25-29. As petitioners concede (Pet. 25), reviewing determinations of probable cause is a fact-specific inquiry. That inquiry has already been conducted several times over in this case.

As the district court observed, "[e]ach FISA application in this case was expressly certified by Attorney General Reno or Acting Attorney General Gorelick as satisfying the criteria and requirements of the FISA statute," and "the surveillance and searches were authorized by eight FISA Court Judges who determined that the government's applications met all the requirements of the FISA statute, including that there was probable cause that the targets were 'agents of a foreign power.'" J.A. 305-306; see also J.A. 292 ("Eight different judges of the FISA Court determined

that the applications satisfied the requirements and criteria of FISA, including a specific finding that the targets were the agents of a then-existing foreign power."). Moreover, on petitioners' motion to suppress evidence, the district court reviewed each application and found that all of the requirements of FISA were satisfied. J.A. 306. On appeal, three additional federal judges "reviewed *de novo* the relevant materials, and likewise conclude[d] that each FISA application established probable cause to believe that [petitioners] were agents of a foreign power at the time the applications were granted." Pet. App. 14a.[20] Particularly given that not one judge has expressed any doubts about the sufficiency of the probable cause showing in this case, no further review by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

BARBARA D. UNDERWOOD
Acting Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
SANGITA K. RAO
Attorney

MARCH 2001

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[20] The court of appeals declined to elaborate further in the interests of national security. Pet. App. 14a-15a. We adopt the same course.